***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-1584

To be Argued By
ROBERT POLSTEIN

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-1584

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CLARA NEMES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT CLARA NEMES

ORANS, ELSEN & POLSTEIN
Attorneys for Defendant-Appellant
CLARA NEMES
One Rockefeller Plaza
New York, New York 10020
(212) 586 - 2211

ROBERT POLSTEIN
GARY P. NAFTALIS
HAROLD B. TEVELOWITZ
Of Counsel

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| -against- | |
| CLARA NEMES, Defendant-Appellant. | |

On Appeal from the United States District Court
For the Southern District of New York

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REPLY BRIEF FOR APPELLANT NEMES

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## POINT I

## THE TAINT ISSUE

The government does not respond to our substantive arguments that in the absence of an evidentiary hearing on the taint issue this conviction cannot stand (G.Br.pp.12-19*). Instead, it cites a number of circumstances that is claimed

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*References to the government's brief are designated "G.Br."; references to our main brief are designated "A.Br."; references to the trial transcript are preceded by "R"; and references to appellant's appendix are preceded by "A."

somehow amount to a waiver of this issue by Nemes' trial counsel.*

The government's contention that appellant's trial counsel "never once requested an evidentiary hearing" (G.Br.p.15) is belied by the record. Nemes' attorney specifically joined in Severino's motion to dismiss on the grounds that this indictment was based on tainted evidence (A.25), Severino's motion clearly

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*Throughout its brief the government repeatedly argues that issues raised on appeal were waived by defense counsel's failure to urge them at trial.

In this respect, it must be emphasized that appellant's present counsel did not conduct the trial.

The government contends that appellant waived her "taint" issue because of trial counsel's failure to submit proper motion papers or demand a hearing; that he failed to make a proper and timely objection to the introduction of the Tarpetto evidence; that he failed to take proper exceptions to the Judge's charge; and that he did not make timely objections to allegedly improper prosecutorial statements during summation.

To this list of alleged omissions, we would add trial counsel's failure to move for a mistrial when Severino's case was severed, which deprived Nemes of a crucial exculpatory witness (R.1242, 1279) and his failure to request limiting instructions.

We had seriously considered raising "inadequacy of trial counsel" as an issue on this appeal, but had abandoned the idea in light of the long-standing test that this Circuit has followed since United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). However, in view of the government's contention that trial counsel "waived" all of appellant's issues -- and considering this Court's repeated appeals for higher standards of trial advocacy -- we agree with the views Judge Oakes expressed in his dissenting opinion in United States v. Rickenbacker, Dkt. No. 76-2036, slip op. 1063 (2d Cir. 12/22/76) and submit that although the performance of trial counsel below may not have been a "farce and mockery" (the Wight standard) it did not amount to "the reasonably competent assistance of an attorney acting as his [defendant's] diligent, conscientious advocate" (United States v. DeCoster, 487 F.2d 1197, 1202 [D.C. Cir. 1973]); and that the time has now come for this Circuit to follow the lead of six other circuits that have rejected the "farce and mockery" test.

requested a hearing and demonstrated the need therefor (A.22-23) and Judge Wyatt recognized that the grounds stated in Nemes' motion were "the same as those relied on by defendant Manlio" (A.29).* Annexed to Severino's motion papers are copies of the Westchester and Putnam County indictments which are based on the same acts as those alleged in this indictment. Thus, Judge Wyatt was fully aware that Nemes' state grand jury testimony concerned the same transactions as the federal indictment and that she sought the same evidentiary hearing as her co-defendant.**

Even if Nemes had not requested an evidentiary taint hearing Judge Wyatt sua sponte could and should have directed such a hearing. This Court, in the context of another constitutional safeguard, has held that a district judge "has a duty to assure himself that the accused understands the potential threat to

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*The government's claim, now raised for the first time, that appellant waived the taint issue because her motion papers were insufficient as to form (G.Br.p.13) is frivolous. The prosecution made no such objection at the time Nemes made the motion, and Judge Wyatt decided it on the merits. We cannot believe that the government seriously contends that appellant should be stripped of her Fifth Amendment protection for an alleged failure to comply with a local procedural rule when such objection was not even urged in the trial court.

**Contrary to the government's claim (G.Br.p.18 fn.) Nemes' trial counsel clearly asserted that her state grand jury testimony was "absolutely parallel" to the federal charges (G.Br.p.14 fn.). We have been informed that such testimony involved the same acts for which she was indicted and respectfully suggest that, lest there be any doubt, this Court examine the testimony.

his Sixth Amendment rights." cf. United States v. Abraham, Dkt. Nos. 76-2135/6, 76-2150, 76-2152, slip op. 603, 655, 625, 735 (1/21/77). We urge that a similar duty existed with respect to appellant's Fifth Amendment rights.

Nor was the absence of a full evidentiary hearing cured by the prosecutor's terse assertion that "we have not seen or used her testimony before the state grand jury" (A.28). As demonstrated in our main brief, the government has a "heavy burden" of proving that the evidence upon which this indictment was based was derived from wholly independent untainted sources (A.Br.pp.18-20). Cases cited by the government (G.Br.pp.17-18) do not relieve the prosecution of this duty, and are somewhat inapposite inasmuch as they deal with search and seizure problems.*

In United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976), which the government relies upon, this Court sharply differentiated the problems involved in evidentiary hearings under claimed Fourth Amendment violations and those arising in Fifth Amendment situations. In Kurzer, the defendant had given immunized grand jury testimony which resulted in the indictment of one Steinman. Steinman pleaded guilty and subsequently testified against Kurzer regarding tax frauds, for which Kurzer was indicted. Kurzer moved to dismiss the indictment on the

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*Indeed, in United States v. Gillette, 383 F.2d 843, 848 (2d Cir. 1967), this Court specifically refused to "foreclose the possibility that, in the appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face."

ground that it had resulted from his earlier immunized testimony against Steinman. The district court, after two evidentiary hearings, dismissed the indictment upon the grounds that Kurzer's immunized testimony had set in motion the train of events which ultimately resulted in his own indictment. The government appealed, and this Court remanded for a further evidentiary hearing to determine whether Steinman's motivation in testifying against Kurzer had been engendered by Kurzer's previous testimony against him.

In Kurzer, this Court distinguished the Fourth Amendment's principal function of deterring unlawful police conduct from the Fifth Amendment's exclusion not only of tainted evidence but of any "information" directly or indirectly "derived" from immunized testimony. In this case the government failed to prove that the indictment against appellant did not result directly or indirectly from her own immunized testimony before state grand juries investigating the same acts for which she was indicted by federal authorities.

Clearly, Nemes could not have been indicted without the testimony of Karlin. She testified in the state grand jury months before Karlin did.* It was never established whether Nemes' testimony before the state grand jury led the state

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*Nemes testified before the Westchester County grand jury on January 30, 1976 and February 27, 1976; Karlin appeared on May 27, 1976 (R.1536-7).

authorities to Karlin, nor whether Karlin would have testified against Nemes if she had not given immunized testimony inculpating him. Here, as in Kurzer, if this indictment resulted either directly or indirectly, from Nemes' immunized grand jury testimony then it was based on tainted evidence.

The only thing that is clear is that in the absence of an evidentiary hearing the government never met its "heavy burden" of establishing that the evidence against Nemes was free from taint. Accordingly, appellant's conviction cannot stand and this case must be remanded.

## POINT II

## THE TARPETTO EVIDENCE

In our main brief, we pointed out that the evidence relating to Tarpetto was improperly received and constituted reversible error. One aspect of the Tarpetto proof involved post-conspiratorial hearsay statements of two sorts -- Karlin's testimony as to Severino's statements about the formation of Tarpetto (R.926-928) and Haydee Nobregas' testimony and characterization as to Olga Vera's appearances before the state grand jury investigating these transactions (R.1459-1460). It is well-settled that such post-conspiratorial hearsay declarations, made after the main purpose of the conspiracy has been accomplished, are inadmissible. Grunewald v. United States,

353 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1949).

The government in its brief does not deny that this testimony was hearsay. Rather, it seeks to avoid the prejudicial impact of this inadmissible proof by asserting that since defendant's trial counsel failed to specifically object on hearsay grounds the error is waived. (G.Br.p.20, fn.). The government's defense of waiver may be dealt with quickly. First, objection was made to this evidence, albeit on grounds other than hearsay, (R.935, 1459), and Judge Wyatt noted a continuing "objection on the part of [Nemes'] counsel to any matters, any evidence pertaining to the Tarpetto situation" (R.935). Hence, timely objection -- although inartistically framed -- was made by defense counsel and the error was preserved for appellate review.

Second, the hearsay nature of this evidence was so plain and its effect so prejudicial that its admission was plain error under Rule 52 of the Federal Rules of Criminal Procedure. Appellate courts have not been reluctant to reverse convictions where hearsay was received, even in the absence of specific objection. Thus, in Glenn v. United States, 271 F.2d 880 (6th Cir. 1959), appellant's counsel failed to object to the hearsay testimony of a conversation between the government's witness and the principal whom appellant was accused of aiding and abetting. Nevertheless, despite the failure to

object, the Court held the reception of the hearsay testimony to be plain error. In Naples v. United States, 344 F.2d 508 (D.C. Cir. 1964), the Court, in finding admission of the hearsay testimony to be plain error, noted that appellant's counsel had objected to the hearsay on other grounds (as did Nemes' trial counsel). In United States v. Pacelli, 491 F.2d 1108 (2d Cir.), cert. denied, 419 U.S. 826 (1974), the Court in finding that the admission of post-conspiratorial hearsay declarations was not harmless error, noted that the prosecutor's use of such testimony in summation compounded the error. So too, in the instant case, the prosecutor extensively used the Tarpetto hearsay in summation, thereby exacerbating the prejudice (A.57-62, 64-67, 79-80, 83-85; R.1574-79, 1581-84, 1644-45, 1648-49).

Apart from the hearsay nature of the proof, it was error to admit the Tarpetto evidence at all. Its relevance was dubious and was clearly outweighed by its prejudicial force. The government's argument that Tarpetto was admissible as a "similar act" ignores this Court's statements that evidence of so-called "similar acts" will not be allowed where their prejudicial impact is greater than their probative value. Thus, in United States v. Baum, 482 F.2d 1325, 1331 (2d Cir. 1973), this Court stated:

> "Given the undoubtable relevancy, the question is not that the evidence is without probative value, but that it probes too deeply into the past life and character of the accused concerning

> conduct which the indictment does not call upon him to answer. Wigmore has marshalled the varied reasons for exclusion of prior criminal conduct and reduced them to three: '(1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) the tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses,-- (3) the injustice of attacking one necessarily unprepared to demonstrate the attacking evidence is fabricated. . . .' J. Wigmore, Evidence §194, pp. 646, 648 (3d Ed.). Each and all of these factors are present in Baum's case."

See also: United States v. Robinson, 544 F.2d 611 (2d Cir. 1976); Bullard v. United States, 395 F.2d 658 (5th Cir. 1968); Mills v. United States, 367 F.2d 366 (10th Cir. 1966); United States v. Torres, 503 F.2d 1120, 1125 (2d Cir. 1974).

Moreover, the Tarpetto evidence was introduced at trial without any forewarning. It was not mentioned in the indictment nor in the bill of particulars nor in the prosecutor's opening statement. Consequently, as in Baum, "the defendant had little or no opportunity to meet the impact of this attack in the midst of the trial. This precarious predictament was precipitated by the prosecutor." 482 F.2d at 1331.

Furthermore, unlike United States v. Braasch, 505 F.2d 139, 149 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975), no "cautious and thorough limiting instructions" were delivered to the jury specifying either that the evidence was admissible as against Severino but not Nemes, or that it was only to be

considered as it relates to motive and intent to participate in the conspiracy charged. cf. United States v. Rosenwasser, Dkt. No. 76-1260 at 1973, 1977-78 (2d Cir. 2/24/77).

In sum, the mini-trial which was Tarpetto was overly prejudicial and without substantial relevance to the instant case. Unlike the cases cited by the government, here Tarpetto was the "tail wagging the dog" and insured appellant's conviction solely because of her involvement with Tarpetto, and not because of her participation in the conspiracy charged.

## POINT III

## THE SUFFICIENCY OF THE EVIDENCE

When intent or state of mind is a necessary ingredient of the offense charged, it must be proven beyond a reasonable doubt.* Bentel v. United States, 13 F.2d 327, 329 (2d Cir.), cert. denied, sub nom. Amos v. United States, 273 U.S. 713 (1926); United States v. Bentvena, 319 F.2d 916, 927-28 (2d Cir.), cert. denied, 375 U.S. 940 (1963); United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975); United States v. Kates, 508 F.2d 308 (3d Cir. 1975). Therefore, in order to establish that Nemes had been a knowing participant in the

*Appellant was charged with having been part of a conspiracy to defraud the United States by submitting false claims for reimbursement under the Medicaid and Medicare laws. Whether the theory behind the charge was a conspiracy to defraud the government or a conspiracy to violate §§287 and 1001 is irrelevant. The "intent" required under either theory is the same. See pp.13-14, infra. The government failed to prove such intent under either theory.

conspiracy charged the government had the duty to prove such knowledge beyond a reasonable doubt.

The cases cited in our main brief at pp.28-33 establish that mere knowledge of shadowy dealings or involvement in an activity of dubious propriety is insufficient to sustain an inference that defendant was part of the particular conspiracy charged. The government makes no attempt to distinguish those cases. Instead, it urges that knowledge and intent may be inferred by virtue of Nemes' "continued association with the participants in the fraud in a position of trust and responsibility."*

However, a showing of association alone is not enough to establish knowledge and intent. United States v. Vilhotti, 452 F.2d 1186, 1189 (2d Cir. 1971), cert. denied, 405 U.S. 1041, 406 U.S. 947 (1972); Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969). Constructive notice or knowledge has no tendency to prove criminal intent. Phillips v. United States, 356 F.2d 297 (9th Cir. 1965), cert. denied, 384 U.S. 952 (1966).

Unlike the cases cited by the government, appellant's position as bookkeeper did not involve her in the preparation of cost reports or operation of the fraudulent scheme. For

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*Apparently in an effort to enhance Nemes' role in the nursing home and to bolster its evidence about her role, the government inaccurately refers to Nemes as an accountant in its brief (G.Br.pp.5, 8). Nothing in the record supports that position. Nemes was simply a bookkeeper, nothing more, nothing less.

example, in United States v. Erb, 543 F.2d 438 (2d Cir. 1976), there was direct testimony that DeBoer, managing partner of a brokerage firm that bore his name, knew that any public offering would require the filing of a registration statement. In fact, he explained that fact, and the problems it presented, to his partners. Similarly, in United States v. Hanlon, Dkt. No. 76-1340, slip op. 1445 (2d Cir. 1/19/77), Katritsis, the confidential secretary of the president and founder of the company, knowingly falsified financial statements in order to obtain a loan. Thus, there was direct evidence that Katritsis knew of the purpose of the conspiracy, which was to obtain loans through fraud, and knowingly acted to further it. In Bentel v. United States, supra, Amos, the sales manager of a brokerage company, not only mailed out prospectuses containing false statements, he also told most, if not all, of the falsehoods of the prospectus in inducing people to buy the stock and added some equally false statements, apparently devised by himself.

The government also claims that Nemes' knowledge may be inferred from the "pervasive documentation regarding Federal payments in the Sprain Brook records" (G.Br.p.25 fn.). No record citation is made for that argument because the documentation regarding federal payments in the Sprain Brook records was simply not pervasive. Furthermore, the government failed to connect Nemes to any of the documents such as the cost reports, which related to the Medicaid and Medicare claims, and which were not merely general bookkeeping records.

Finally, the government contends that the Tarpetto testimony was evidence of guilty intent. As we have noted in Point II, supra, the Tarpetto evidence should not have been received at all.

## POINT IV

## ERROR IN THE COURT'S CHARGE

Judge Wyatt failed to instruct the jury that the government had the burden of proving beyond a reasonable doubt that appellant possessed specific intent to defraud the government. The failure to give that instruction, which was requested by both the government and defense counsel, constituted prejudicial error.*

Count One of the indictment charges Nemes with conspiring to defraud the government by filing false claims for Medicare and Medicaid reimbursement. The government contends that Count One actually sets forth two different theories of conspiracy -- one to defraud the government and the other to violate 18 U.S.C. §§1001 and 287. No matter how many theories of conspiracy the

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*The government's quotation from the transcript emphasizing defense counsel's purported failure to except to the charge (G.Br.p.27, fn.) is selective and disingenuous. The quote stops at the point where Judge Wyatt denied defense counsel's request for a charge on specific intent, and omits the remainder of the colloquy:

"Mr. Russo: May they be noted as objections to the Court's charge?

The Court: Of course." (R.1687).

government wishes to allege, all involve the same facts and all require the same specific intent to defraud the government. The cases cited in our main brief at p.36, establish that the mens rea requirement for conspiring to violate 18 U.S.C. §1001 and 287 is the specific intent to defraud the government.

Clearly, the requisite mens rea under the government's theory that Nemes conspired to defraud the United States is the specific intent to defraud the government by filing false claims for Medicare reimbursement. United States v. Kates, 508 F.2d 308 (3d Cir. 1975). See also, Dennis v. United States, 384 U.S. 855, 861 (1966) (Section 371 reaches "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government."); United States v. Aloi, 511 F.2d 585, 592-93 (2d Cir.), cert. denied, 423 U.S. 1015 (1975) ("[T]he jury could find the defendant guilty of conspiracy . . . only if it were established that he knew of the unlawful purpose of the conspiracy."); United States v. Woll, 157 F.Supp. 704, 707-09 (E.D. Pa. 1957). Most significantly, the government acknowledged that specific intent to defraud the government is a necessary element of the conspiracy charged in Count One when it requested such a charge (A.88-89).

The government also contends that Judge Wyatt's charge, taken as a whole, was adequate on the issue of the state of mind needed to convict. We disagree. The major part of the charge upon which the government relies (G.Br.pp.28-29) dealt

only with the initial question of whether there was in fact a conspiracy, which Judge Wyatt defined as an unlawful combination or agreement to violate the law or defraud the United States (A.110). Those instructions were given to aid the jury in determining whether there was in fact a conspiracy (A.97, 110). As a result, the jurors were justified in concluding that there was a conspiracy involving Severino and Karlin (as we conceded at p.29 of our main brief).

However, given the existence of a conspiracy, the jurors still had to find that Nemes was a knowing participant. On this score the charge was in error. Judge Wyatt, in instructing the jury on the degree of intent required to establish appellant's participation in the conspiracy, failed to charge that she must have had the specific intent to defraud the government. Judge Wyatt did not use the words "specific intent", and also failed to convey the meaning of those words. The government claims (G.Br.p.31) that the jury was instructed that it must find Nemes' "participation was characterized by an intent to further the illegal or fraudulent aim of the conspiracy." That is incorrect. Unlike United States v. Gentile, 530 F.2d 461 (2d Cir.), cert. denied, 96 S.Ct. 2651 (1976), Judge Wyatt failed to adequately advise the jury that unless it was proved that Nemes had knowledge of the unlawful purpose of the conspiracy and had actual knowledge that she was participating in the crime charged, she could not be convicted of that crime.

The Court's only instructions on that point were that before the jury could convict it must find that "Clara Nemes knowingly associated herself with the conspiracy" (A.109) and that the jury must "determine whether the defendant on trial Clara Nemes . . . knowingly and wilfully associated herself with the conspiracy" (A.112).

Judge Wyatt's instruction permitted the jury to convict because of appellant's knowledge of shadowy dealings, or involvement in dubious activities, such as Tarpetto, even though such conduct was not in furtherance of the conspiracy charged. Thus, the failure to properly instruct the jury on the degree of scienter required went to the very heart of this case. See United States v. Robinson, 545 F.2d 301 (2d Cir. 1976).

In Robinson, although appellant had not even assigned it as error, this Court sua sponte held that a failure to properly charge the jury on the degree of required scienter constituted plain error requiring reversal. Robinson strictly limited United States v. Erb, 543 F.2d 438, 447 (2d Cir. 1976), upon which the government relies. Moreover, the Robinson-Erb line of cases focuses on instructions as to the manner in which intent may be proven. The case at bar has a much more serious defect -- the charge failed to properly define that degree of intent which is an essential element of the conspiracy charged.

As a result of the inadequate charge the verdict cannot stand.

## POINT V

## THE IMPROPER SUMMATION

Buried near the very end of its 42 page brief lies the government's concession that a portion of the prosecutor's summation "might better have been left unsaid" (G.Br.p.41).

This Court, on more than one occasion, has warned government lawyers that inflammatory prosecutorial conduct will not be tolerated and in United States v. Bivona, 487 F.2d 443, 447 (2d Cir. 1973), specifically cautioned:

> ". . . unless the prosecutor heeds our recent warnings, we may be left with no alternative but to reverse convictions where the argument of the prosecution goes beyond what is permissible and fair."

See United States v. White, 486 F.2d 204 (2d Cir. 1973); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

Judging from the prosecutor's summation in this trial, the Bivona Court's expectation "that our criticism here and in White will not fall on deaf ears" appears to have been overly optimistic.

Although urging that "minor transgressions" were waived by defense counsel's failure to timely object, the government devoted some ten pages of its Brief to a tortured attempt at justifying the trial assistant's improper remarks.

We have already pointed out the extremely inflammatory character of the "forgery" and "money laundering" comments

(A.Br.pp.38, 40). Far more egregious was the prosecutor's purported quote of Olga Vera's "brainwashed" testimony before a state grand jury (A.67; R.1585). Significantly, the government does not meet the argument that such a remark was based on inadmissible hearsay (A.Br.pp.26-27, 38-39), but urges that "the prosecutor was doing nothing more than summarizing the reasonable inferences that could be drawn from the evidence" (G.Br.37). This is just not so.

When an Assistant United States Attorney begins his summation by stating that he will describe "what we think happened" (A.32; R.1548) and ends his summation by reciting his version of an absent witness' alleged testimony to a state grand jury (A.67; R.1584) the only "inference" that the jury could draw is that the prosecutor knew what the grand jury evidence had been and was fairly quoting it. In short, when the prosecutor interjected his personal knowledge of Olga Vera's grand jury testimony into the summation, he put his own credibility in issue. This Court has emphatically denounced such conduct. See United States v. Drummond, supra.

The prosecutor's references to appellant's failure to testify are even more appalling. In every case cited by the government (G.Br.p.41) the prosecutor had been provoked into making heated replies to unfair defense summations. In this case, however, the government was clearly the aggressor! Four of the five objectionable comments were made in the prosecutor's

opening summation -- before he had any idea what the defense arguments would be.

Here, when the prosecutor initially argued "there is no evidence" as to what appellant did with excess cash she allegedly took from the Limpio payroll (A.51; R.1568), and said, with reference to appellant's repayment of the Tarpetto loan, that "there is no evidence of any jewelry being sold" (A.65; R.1582) he was clearly directing the jury's attention to questions that only the defendant could answer. Clearly, that argument was "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" and was improper. See United States v. Burse, 531 F.2d 1151, 1155 (2d Cir. 1976). And, most importantly, these unfair comments were made before the defense summation.

The government concedes that "[t]he prosecutor's observations about Nemes' conduct at counsel table (Tr.1582) might better have been left unsaid" but attempts to minimize the incident by characterizing it as merely "a minor transgression" (G.Br.p.41). There are no "minor" transgressions in a case as close as this one and the prosecutor's improprieties are magnified by the thinness of the proof against appellant. United States v. Burse, supra. The invidiousness of such conduct must be examined in light of other errors that occurred during the trial. As this Court stated in United States v. Alfonso-Perez, 535 F.2d 1362, 1366 (2d Cir. 1976):

> "We doubt that this comment by itself would have substantially prejudiced defendant's case, and in itself it may have amounted to harmless error, if error at all. But we stress again the combination of errors in this trial. It is harder to consider these comments insignificant when they are taken together, as they must be, with the other problems we have discussed."

Similarly, in United States v. Drummond, supra, this Court held that it need not decide whether any single act of alleged prosecutorial misconduct required reversal, since "the combination of them leaves us no other course."

Here, as in the cases cited above, the devastating cumulative effect of the government's improper summation, piled upon other errors that occurred during the course of this extremely close case, mandate reversal and a new trial.

## CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

ORANS, ELSEN & POLSTEIN
Attorneys for Defendant-Appellant
CLARA NEMES
One Rockefeller Plaza
New York, New York 10020
(212) 586 - 2211

Of Counsel:

Robert Polstein
Gary P. Naftalis
Harold B. Tevelowitz